IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.02.2007

CORAM

THE HONOURABLE MR.A.P.SHAH, THE CHIEF JUSTICE
AND
THE HONOURABLE MR.JUSTICE K.CHANDRU

W.A.No.1413 of 2006

Industrial Development
Bank of India Limited
by Deputy General Manager
& the Authorised Officer
115, Anna Salai
Saidapet
Chennai 600 015 .. Appellant

-Vs-

M/s Kamaldeep Synthetics Limited
rep.by its Managing Director V.Nandakumar
No.A-1, Alankar Apartment
No.12, Raman Street
T.Nagar, Chennai 600 017 .. Respondent

Appeal filed under Clause 15 of the Letters Patent, against the order dated 8.9.2006 made in W.P.No.11009 of 2006 to issue a Writ of Certiorari to call for the records of the Respondent in proceedings dated 20.2.2006 and quash the same.

For Appellant :: Mr.N.V.Srinivasan for
M/s N.V.S. & Associates

For Respondent :: Ms.J.Anandhavalli

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JUDGMENT

(Judgment of the Court was delivered by
The Hon'ble The Chief Justice)

Admit. Learned counsel appearing for the respondent waives service. By consent, the appeal is taken up for hearing.

2. This appeal is directed against the judgment and order of the learned single Judge dated 8.9.2006 in Writ Petition No.11009 of 2006.

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3. The brief facts leading to the appeal are as follows:-

The appellant-IDBI had sanctioned financial assistance aggregating Rs.400 lakhs (since reduced to Rs.394 lakhs) to the respondent for setting up a new unit for manufacture of texturised and draw twisted polyester filament yarn with an installed capacity of 600 tpa, in Uruvaiyaru, Villianur Panchayat in Puducherry and for the said purpose, the respondent had executed loan and security documents. As the respondent defaulted in repayment of the principal amount of the loan and in payment of interest and other charges in terms of the relevant loan agreements entered into with the appellant, the appellant filed recovery application against the respondent and others before DRT, Chennai, being O.A.No.960 of 1998 for a claim amount of Rs.6,67,56,908/= as on 31.3.98 together with further interest and other charges at agreed rates till realisation. In view of the promulgation of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "SARFAESI Act"), whose prime object was to enable the banking community to speed up the NPA recoveries, the appellant decided to take recourse to the provisions of the SARFAESI Act. Accordingly, the appellant issued the requisite notice under Section 13(2) of the SARFAESI Act on 20.12.2005. This notice was replied by the respondent, which was also responded to by the appellant in accordance with the provisions of Section 13(3-A) of the SARFAESI Act. After verification of compliance of the provisions of Section 13(9) of the SARFAESI Act, the Authorised Officer of IDBI Ltd., took possession of the secured assets on February 20, 2006 in terms of Section 13(4) of the SARFAESI Act.

4. The legality and validity of notices issued by the appellant-Bank under the SARFAESI is questioned in the present writ petition mainly on the ground that without withdrawing the O.A. filed by the appellant before the DRT, invoking of the provisions of Section 13 of the SARFAESI Act is not permissible, in view of the Division Bench decision of this Court in **Digivision Electronics Ltd., v. Indian Bank (2005 (3) CTC 513).** Learned single Judge, following the dicta in the **Digivision Electronics Ltd., v. Indian Bank**, has held that the notices issued under Section 13(2) and Section 13(4) of the SARFAESI Act are contrary to Section 19(1) of the SARFAESI Act and are illegal and without jurisdiction.

5. We have heard Mr.N.V.Srinivasan, learned counsel appearing for the appellants and Ms.J.Anandhavalli learned counsel appearing for the respondents. In our opinion, the Division Bench decision of this Court in *Digvision Electronics Ltd., v. Indian Bank (cited supra)* is no longer a good law, in view of the decision of the Suprmeme Court in *Transcore v.Union of India, (2006) 5 CTC 753.* In *Transcore's case*, the Supreme Court has clearly held that the withdrawal of O.A pending before the DRT is not a pre-condition for taking recourse to the SARFAESI Act. It is for the bank/financial institition to exercise its discretion as to cases in which it may apply for leave and in cases where it may not

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apply for leave to withdraw. Therefore, in the light of the decision in *Transcore's* case, the appellant is entitled to proceed in accordance with the provisions of the SARFAESI Act without withdrawal of the O.A pending before the DRT.

6. Ms.J.Anandhavalli, learned counsel appearing for the respondent, however, submitted that there has been total non-compliance of Section 13(3-A) of the SARFAESI Act and, therefore, the entire proceedings are vitiated. Learned counsel submitted that in response to the notice dated 20.12.2005 issued under Section 13(2), a reply letter dated 16.2.2006 was sent by the respondent raising objections to the said notice. The reasons for non-acceptance of the objections raised were communicated by the appellant-bank only by letter dated February 22, 2006. However, before even communicating the reasons, the appellant-bank issued the possession notice on February 20, 2006. According to the learned counsel, the notice for possession under Section 13(4) of the SARFAESI Act could be issued by the bank only after the reasons for non-acceptance of the objections were communicated by the appellant-bank to the respondent-borrower and therefore, notice under Section 13(4) is illegal and valid.

7. We are unable to accept the submission of the learned counsel for the respondent. Section 13(3-A) of the SARFAESI Act, which was incorporated by the Amendment Act 30 of 2004, provides that if, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor must consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower. This provision is obviously incorporated in the light of the decision of the Supreme Court in **Mardia Chemicals Ltd., v. Union of India (2004 (4) SCC 311).**

8. In **Mardia Chemicals case,** the Supreme Court held that under Section 13(2) of the SARFAESI Act, it is incumbent upon the secured creditor to serve sixty days notice before proceeding to take action under sub-section (4) of Section 13 of the SARFAESI Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief that may be, must be communicated to the borrower. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the DRT under Section 17 of the SARFAESI Act, at that stage. The Court explained that communication of reasons not to accept the objections of the borrower is for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor, who intends to resort to harsh steps of taking over the management/business of namely,

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the secured assets without intervention of the Court. Such person in respect of whom steps under Section 13(4) of the SARFAESI Act are likely to be taken cannot be denied the right to know the reason for non-acceptance of his objections. This will be in keeping with the concept of right to know and lender's liability of fairness to keep the borrower informed particularly of the developments immediately before taking measures under sub-section (4) of Section 13 of the SARFAESI Act. The Court, however, made it clear that as per the provisions of the SARFAESI Act, the borrower will not be entitled to challenge the reasons communicated or the likely action of the secured creditor at the stage of communication of reasons, unless his right to approach the DRT as provided under Section 17 of the SARFAESI Act matures on any measure having been taken under sub-section (4) of Section 13 of the SARFAESI Act.

9. The proviso to sub-section (3-A) of Section 13 of the SARFAESI Act makes it abundantly clear that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the DRT under Section 17 or the Court of District Judge under Section 17-A of the Act. Thus, the basic object of sub-section (3-A) of Section 13 of the SARFAESI Act is to ensure the element of transparency and fair play in the implementation of the provisions of the SARFAESI Act. Learned counsel for the respondent is unable to demonstrate prejudice or loss that is likely to be caused to the respondent by reason of the possession notice given to it, earlier to the communication of the reasons for non-acceptance of the objections raised by the borrower. In our opinion, at the most, it would amount to a mere irregularity and having regard to the facts and circumstances of the case, we are satisfied that the appellant-bank has substantially complied with the provisions of Section 13(3-A) of the SARFAESI Act.

10. In the result, for the foregoing reasons, the appeal is allowed. The order of the learned single Judge is set aside and the writ petition stands dismissed. This is without prejudice to the rights of the borrower to approach the DRT under Section 17 of the SARFAESI Act, if so advised. If the appeal under Section 17 of the SARFAESI Act is preferred by the respondent within a period of four weeks, the DRT shall decide the appeal on its own merits without raising the issue of limitation. Consequently, M.P.No.1 of 2006 is closed. No costs.

ss/pv

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

The Deputy General Manager
and Authorised Officer
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+ 1 cc to M/s. NVS & Associates, Advocate, SR No.6205

+ 1 cc to Mr. J. Anandhavalli, Advocate, SR No.5846

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